

BRENTWOOD, INC.

IBLA 83-689

Decided September 21, 1983

Appeal from the decision of the Eastern States Office, Bureau of Land Management, rejecting coal lease application ES 30788.

Affirmed.

1. Coal Leases and Permits: Applications-Surface Mining Control and Reclamation Act of 1977: Words and Phrases  
"Dredging." Dredging to recover coal from a lake or river is a surface coal mining operation as defined in the Surface Mining Control and Reclamation Act of 1977. A coal lease application to dredge a river and lake in a national forest is properly rejected where it does not meet the criteria set out in sec. 522(e) of that Act and 43 CFR 3461.1(a)(2)(i).

APPEARANCES: Rudy Yessin, Esq., Frankfort, Kentucky, for appellant; Mark K. Seifert, Division of Energy and Resources, Office of the Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Brentwood, Inc., has appealed the decision of the Eastern States Office, Bureau of Land Management (BLM), dated March 24, 1983, rejecting its

application for a coal lease, ES 30788. Appellant proposed to dredge coal from the bottom of the Cumberland River and Lake Cumberland within the boundaries of the Daniel Boone National Forest in Kentucky.

BLM found that the legislative history of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (Supp. I 1977) reveals a clear intention that dredging to recover coal should be treated as a surface coal mining operation and that, under section 522(e) of SMCRA, 30 U.S.C. § 1272(e) (Supp. I 1977), and Departmental regulation 43 CFR 3461.1(a)(2)(i) a coal lease application to surface mine within a national forest east of the 100th meridian must be rejected unless the operations are incident to an underground coal mine.

Under the Department of the Interior's coal management regulations, 43 CFR Part 3400, Federal lands within the national forest system are generally available for leasing, subject to the consent of the surface management agency, the Department of Agriculture. See 43 CFR 3400.2 and 3400.3-1. The Secretary of the Interior may issue leases authorizing surface coal mining operations within a national forest, however, only under the criteria spelled out in section 522(e) of SMCRA and 43 CFR 3461.1(a)(2)(i). As stated in the regulation:

A lease may be issued within the boundaries of any National Forest if the Secretary finds no significant recreational, timber, economic or other values which may be incompatible with the lease; and (A) surface operations and impacts are incident to an underground coal mine, or (B) where the Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those National Forests west of the 100th Meridian,

that surface mining may be in compliance with the Multiple-Use Sustained-Yield Act of 1960, the Federal Coal Leasing Amendments Act of 1976 and the Surface Mining Control and Reclamation Act of 1977.

In its statement of reasons, appellant argues that its proposed dredging operation is not surface coal mining. Appellant seeks to recover coal that has been carried through waterways, creeks, and rivers and deposited on the bottom of the lake and river. Appellant urges that it intends to use a "clean process," whereby the coal in the water will be pumped to the surface, separated from the water, and the water returned to the lake or river, without disturbing the environment. He points out that there will be no mine facilities, roads, trenches, overburden, or waste storage areas, only a floating tippie.

[1] The issue whether dredging to recover coal is a surface coal mining operation under SMCRA may be examined in two ways: as a question of definition and a question of the intention of Congress.

The term "dredging" has been defined most simply as "[a] form of excavation conducted under water." A Dictionary of Mining, Mineral, and Related Terms at 349, Bureau of Mines, Department of the Interior (1968). A "dredge" is a "[l]arge floating contrivance utilized in underwater excavation for the purpose of \* \* \* removing overburden from submerged ore bodies prior to open-pit mining; or to recover subaqueous deposits having commercial value." Id. at 348.

Appellant distinguishes his proposed dredging operation from surface mining by noting that there will be "no mine facilities, road, trenches, overburden or waste storage areas," yet he plans to extract 1,600 to 1,800 tons of coal a week from the bed of the river and lake. The coal will be separated from the water by a separating machine on a floating tippie and then towed by barge to a power plant.

Section 701(28) of SMCRA, 30 U.S.C. § 1291(28) (Supp. I 1977), defines "surface coal mining operations" broadly to mean

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 1266 of this title surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: Provided, however, That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16-2/3 per centum of the tonnage of minerals removed for purposes of commercial use or sale or coal explorations subject to section 1262 of this title; and

(B) the areas upon which such activities occur or where activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities[.]

The dredging proposed by appellant is an underwater method of excavation to obtain coal. It is an accepted principle of statutory construction that the word "including," as used in the above definition to identify methods of coal excavation, indicates that the list that follows is illustrative, not inclusive. It is a term of enlargement. Argosy Limited v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968); 2A Sutherland Statutory Construction, § 47.07 (4th ed. 1973). Thus the absence of the word dredging from the list of excavation methods does not operate to place dredging activities outside the scope of SMCRA.

What distinguishes dredging from the other excavation methods is that it occurs on water, not hard earth. A recent court decision, however, disposed of that distinction by finding that the phrase "surface of lands" as used in SMCRA "clearly means the surface of the earth, including the waters thereon," and likened dredging to placer mining as a form of surface mining. United States v. H.G.D. & J. Mining Co., 561 F. Supp. 315 (S.D. W.Va. 1983) (operation of dredging coal from river was covered by SMCRA, obligating operator to pay reclamation fees).

Further, it appears that dredging was contemplated by Congress to be one of the activities to which SMCRA was directed even though the term dredging was not stated in the definition. The discussion of the definition of "surface mining operations" in the 1977 Senate Report which preceded passage of SMCRA states in part:

"Surface mining operations" is so defined to include not only traditionally regarded coal surface mining activities but

also surface operations incident to underground coal mining, and exploration activities. The effect of this definition is that coal surface mining and surface impacts of underground coal mining are subject to regulation under the Act. Activities included are excavation to obtain coal by contour, strip, augur, dredging,  
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S. Rep. No. 128, 95th Cong., 1st Sess. 98 (1977). Reports from previous sessions of Congress contain similar language. E.g., S. Rep. No. 28, 94th Cong., 1st Sess. 224 (1975); S. Rep. No. 402, 93rd Cong., 1st Sess. 74 (1973).

Moreover, In Argosy Limited v. Hennigan, supra at 20, the court noted that

statutory construction must not occur in a vacuum. Statutes are contextual as well as textual. Securities & Exchange Commission v. C.M. Joiner Leasing Corp., 1943, 320 U.S. 344, 64 S.Ct. 120, 88 L.Ed. 88. Their proper interpretation requires more than mere linguistic seriation. Courts must also look to the logic of Congress and to the broad national policy which prompted the legislation. Miller v. Amusement Enterprises, Inc., 5 Cir. 1968, 394 F.2d 342, 353.

We find that the type of activity that appellant proposes is surface mining within the context of SMCRA. The removal of 1,600 to 1,800 tons of coal a week from the bed of a river or lake is not insignificant and simply because appellant projects that the impacts to the environment will be minimal does not mean that the activity is excluded from the coverage of SMCRA. BLM properly characterized appellant's proposed dredging operation as a surface coal mining operation not falling within the exception to the prohibition on leasing in a national forest.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Eastern States Office is affirmed.

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Will A. Irwin  
Administrative Judge

We concur:

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Bruce R. Harris  
Administrative Judge

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Franklin D. Arness  
Administrative Judge  
Alternate Member

